

STATE OF COLORADO

STATE PERSONNEL BOARD Meeting Minutes



December 17, 2002

The State Personnel Board met in public session on Tuesday, December 17, 2002, at the Colorado Department of Transportation, 4201 East Arkansas Avenue, Second Floor Auditorium, Denver, Colorado 80222.

The meeting was called to order by Chair Joyce Lottner at approximately 9:05 a.m. In addition to Ms. Lottner, the following Board members were present: Diedra Garcia, Elizabeth Salkind, Linda Siderius, and John Zakhem.

Stacy L. Worthington, Board Director; Assistant Attorney General Richard Forman, Board Counsel; and Jane Sprague, Legal Assistant, were also present.

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VIII. REPORT OF THE STATE PERSONNEL DIRECTOR - TROY A. EID

Mr. Eid reported on the appearance of the Department of Personnel and Administration (DPA), including the State Personnel Board, before the Joint Budget Committee (JBC) to defend its budget. Noting that the governor's budget must be balanced, he stated that he had requested both salary survey and pay for performance funding as important parts of the budget. Turning to the cost of benefits, and in particular health insurance, he characterized the system as "dysfunctional" because unless an employee's salary is \$80,000 or more, that employee is increasingly "worse off" due to the rising cost of benefits every year as he loses ground and the state fails to increase its contribution to the cost of benefits. Currently, Colorado is 49th in the nation for benefits paid by the state as employer and is uncompetitive in this area.

As an example of how funds could be shifted but still balance the budget, Mr. Eid used the figure of \$68 million. The state could spend \$40 million to give all employees currently on a benefits plan (75% of employees are on such a plan) a competitive benefits package. The other \$28 million could be used on salary survey and performance pay funding. Stating that he is not afraid to raise the issues, he announced that Lola Spradley has agreed to sponsor a total compensation bill in the legislature this term which would provide a more equitable benefits package for state employees.

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RULEMAKING - This portion of the Board meeting was tape-recorded.

- A. State Personnel Board in conjunction with Department of Personnel and Administration - Board Rules pertaining to Senior Executive Service (SES)

Board Rules R-4-11; R-6-2; R-7-7; R-8-5; R-8-20; R-8-45; R-8-52; R-8-68; and R-8-69

- B. State Personnel Board

Board Rules R-1-4; R-1-9; R-1-11; R-4-11(A); R-6-4; R-6-9; R-6-10; R-6-12; R-7-12; R-7-13; R-7-21; R-8-20; R-8-22; R-8-30; R-8-32; R-8-38; R-8-42; R-8-45; R-8-46; R-8-49; R-8-53; R-8-54; R-8-58; R-8-60; R-8-62; R-8-63; R-8-65; and R-8-67

A public rulemaking hearing was convened on December 17, 2002, pursuant to the Notice of Public Hearing to Consider Adoption of Permanent Administrative Procedures issued on October 17, 2002, and the Notice of Public Hearing to Consider Adoption of Permanent Rules issued on October 18, 2002, and published in the Colorado Register on November 10, 2002. The Statement of Basis, Specific Statutory Authority, and Purpose for the State Personnel Director's Adoption of Permanent Administrative Procedures and the Proposed Statement of Basis and Purpose for the Board rules, as well as the notices and the proposed language, have been available for review on the state's website (<http://www.state.co.us/dhr/rules/rules.htm>) since November 22, 2002, and in the offices of the Executive Director and the State Personnel Board, respectively.

Following an introduction to the rulemaking hearing by Ms. Lottner, Board Chair, the first order of business was rulemaking of the State Personnel Board in conjunction with Department of Personnel and Administration pertaining to Senior Executive Service (SES). Ms. Lottner and Troy A. Eid, Executive Director, Department of Personnel and Administration (DPA), conducted this portion of the rulemaking with Cristina Valencia of DPA and Stacy L. Worthington, Director of the State Personnel Board. Before testimony

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was taken, Paul Farley, Deputy Executive Director, and Ken Allikian and Jeff Schutt, DPA/Division of Human Resources, provided introductory remarks about the history and meaning of SES.

The following rules pertaining to SES were considered:

- R-4-11: Amendment to remove reference to SES.
- R-6-2: Amendment to remove language exempting SES employees from progressive discipline.
- R-7-7: Amendment to remove language that denies SES employees rights in layoff.
- R-8-5: Amendment to remove language that prohibits SES employees from filing grievances.
- R-8-20: Amendment to remove language that prohibits SES employees from filing petitions for declaratory order.
- R-8-45: Amendment to remove language that limits appeal rights of employees in SES.
- R-8-52: Amendment to clarify appeal rights of employees in the SES.
- R-8-68: New provision to clarify waiver of certain rights and eligibility for certain privileges upon acceptance of an SES pay plan.
- R-8-69: New provision to permit employees in SES prior to June 1, 2003, to revert to traditional pay plan with all rights of employees in classified service.

In addition to receiving written comments, Mr. Eid and Ms. Lottner solicited comments from the public. Anna Marie Campbell, DOC; Vonda Hall, CAPE; Celina Benevidez, DOT; Cheryl Hutchison, AFSCME; and Jennifer Finch, DOT, provided oral testimony regarding

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SES and the proposed procedures and rules. Mr. Eid then closed DPA's portion of the hearing relating to SES and said he would take the comments under advisement.

Ms. Siderius moved that the Board close testimony on SES and further consider this matter at the January 21, 2003 public meeting of the State Personnel Board. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Ms. Siderius, Mr. Zakhem, and Ms. Lottner.

Immediately following the hearing held in conjunction with the State Personnel Director, the State Personnel Board considered adoption of permanent rules including, but not limited to, the following:

R-1-4: Amendment to clarify due date for materials.

R-1-9: Amendment to clarify employees' duty.

R-1-11: Amendment to clarify approval for outside employment.

R-4-11(A): Amendment to clarify that trial service employees may be laid off.

R-6-4: Amendment to provide that repeated unsatisfactory performance ratings can result in termination.

R-6-9: Amendment to clarify nature of criminal offenses that can lead to disciplinary action, and to clarify standard to be applied in modifying the type of discipline.

R-6-10: Amendment to clarify the information that must be provided at predisciplinary meeting.

R-6-12: Amendment to remove requirement of certified mail when a notice is hand-delivered.

R-7-12: Amendment to clarify length of notice period.

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- R-7-13: Amendment to clarify retention areas within University of Colorado.
- R-7-21: Amendment to state when incentives may be offered.
- R-8-20: Amendment to clarify number of copies that must be filed.
- R-8-22: Amendment to conform rule to statute.
- R-8-30: Amendment to clarify when State Personnel Board must appoint third party investigator.
- R-8-32: Amendment to clarify the party's duty to provide notice of filing with CCRD and consequences of failure to file.
- R-8-38: Amendment to clarify when fees may be awarded against a party or counsel.
- R-8-42: Amendment to clarify procedures for filing and considering motions.
- R-8-45: Amendment to clarify types of actions giving rise to discretionary review.
- R-8-46: Amendment to clarify procedures for filing petition for discretionary hearing.
- R-8-49: Amendment to clarify the information that must be provided by parties and the standards for the preliminary recommendation.
- R-8-53: Amendment to clarify deadlines for discovery.
- R-8-54: Amendment to clarify procedures for hearing commencement.
- R-8-58: Amendment to clarify deadlines for filing appeals and certifying record.
- R-8-60: Amendment to clarify procedures for including transcript as part of the

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certified record.

R-8-62: Amendment to clarify briefing schedule when both parties appeal.

R-8-63: Amendment to clarify final deadlines for briefs.

R-8-65: Amendment to clarify procedure for filing and ruling on motions.

R-8-67: Amendment to clarify procedure for security at hearings.

In addition to receiving written comments, Ms. Lottner solicited comments from the public. Paul Perales, CU; Anna Marie Campbell, DOC; and Vonda Hall, CAPE, provided oral testimony regarding the proposed rules before the Board. Due to time constraints, Ms. Salkind left the meeting at 1:20 p.m.; Ms. Garcia left the meeting at 1:35 p.m.

Mr. Zakhem moved that the rulemaking hearing be continued to the January 21, 2003 public meeting of the State Personnel Board. Ms. Siderius seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Siderius, Mr. Zakhem, and Ms. Lottner.

A list of written comments to both portions of the rulemaking hearing is attached as ATTACHMENT A to the minutes.

I. REQUESTS FOR RESIDENCY WAIVERS

A. December 1, 2002 Report on Residency Waivers.

This portion of the meeting was tabled due to the time consumed for rulemaking.

II. PENDING MATTERS

This portion of the meeting was tabled due to the time consumed for rulemaking.

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A. Outstanding Motions

1. Robert W. Terry v. Department of Public Health and Environment, State Personnel Board case number 2001G051.

On October 23, 2002, the Board entered an order to comport with the remand from the Court of Appeals: the case is remanded to the Administrative Law Judge for purposes of allowing Complainant and Hobbs an opportunity to present evidence on the issue of attorney fees. On November 1, 2002, Complainant filed a Motion for Order Vacating Board's Order of October 23, 2002 and for Reconsideration of Substance of Order Remanding to the ALJ. Respondent's Response to Complainant's Motion for Order Vacating Board's Order of October 23, 2002 and for Reconsideration of Substance of Order Remanding to the ALJ was filed on November 6, 2002. Complainant's Reply Supporting his Motion to Vacate the Board's Order of October 23, 2002 was filed November 12, 2002.

2. Ellen Mangione v. Department of Public Health and Environment, Disease Control Division, State Personnel Board case number 2002G124.

On November 22, 2002, the Board issued an Order of the State Personnel Board Denying Petition for Hearing. Complainant's Motion For Reconsideration was filed on November 25, 2002.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

- A. Nestor Lujan v. Department of Revenue, Motor Vehicle Business Group, State Personnel Board case number 2002B076.

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Upholding the Administrative Law Judge's conclusions of law that the appointing authority's action was arbitrary and capricious and the discipline imposed was unwarranted, Mr. Zakhem moved to adopt the findings of fact and conclusions of law 1 and 2 of the Initial Decision of the Administrative Law Judge. Ms. Siderius seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Siderius, Mr. Zakhem, and Ms. Lottner. Ms. Garcia and Ms. Salkind were absent.

After a lengthy discussion regarding the award of attorney fees, Ms. Siderius moved to uphold conclusion of law 3 that Complainant is entitled to an award of attorney fees and costs. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Siderius and Ms. Lottner. Mr. Zakhem voted in opposition to the motion. Ms. Garcia and Ms. Salkind were absent.

B. Roderick Brown v. Department of Corrections, Territorial Correctional Facility, State Personnel Board case number 2002B043.

Finding that the Order Granting Motion for Additional Time to File Brief clearly set out the deadline for filing Complainant's opening brief and that the Brief of Complainant-Appellant was filed untimely, Mr. Zakhem moved to grant Respondent's Motion to Dismiss. Ms. Siderius seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Siderius, Mr. Zakhem, and Ms. Lottner. Ms. Garcia and Ms. Salkind were absent.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

There were no preliminary recommendations of administrative law judges or the Director on review before the Board this month.

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V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES

This portion of the meeting was tabled due to the time consumed for rulemaking.

- A. Randy Santistevan v. Department of Transportation, State Personnel Board case number 2003B005.

On November 20, 2002, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's disciplinary termination of Complainant was not arbitrary, capricious or contrary to rule or law. The ALJ ordered that Respondent's action is affirmed and Complainant's appeal is dismissed with prejudice.

- B. Michael Scott Cortese v. Department of Corrections, State Personnel Board case number 2003B014.

On November 27, 2002, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's disciplinary termination of Complainant was not arbitrary, capricious or contrary to rule or law. The ALJ ordered that Respondent's action is affirmed and Complainant's appeal is dismissed with prejudice.

- C. Michael Jefferson v. Department of Regulatory Agencies, Division of Registrations, State Personnel Board case number 2001G014.

On December 2, 2002, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent did not racially discriminate against Complainant, Respondent did not create a hostile work environment for Complainant, and attorney fees are not warranted. The ALJ ordered that Respondent's action is affirmed and Complainant's appeal is dismissed with prejudice.

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- D. James McNaught v. Department of Revenue, State Personnel Board case number 2003B031.

On December 4, 2002, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's disciplinary termination of Complainant was not arbitrary, capricious or contrary to rule or law. The ALJ ordered that Respondent's action is affirmed and Complainant's appeal is dismissed with prejudice.

VI. REVIEW OF THE MINUTES FROM THE NOVEMBER 19, 2002 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Ms. Siderius moved to approve the minutes of the November 19, 2002 meeting as submitted. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Siderius, Mr. Zakhem, and Ms. Lottner. Ms. Garcia and Ms. Salkind were absent.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS NOVEMBER 19, 2002 PUBLIC MEETING:

- A. Department of Personnel and Administration Retention Area Request

Board voted to grant the request of the Department of Personnel and Administration to establish a separate retention area for each of the major organizational divisions: Executive Office, Human Resources, Central Services, Finance & Procurement, Information Technologies, and Administrative Hearings, including the State Personnel Board in the retention area of Administrative Hearings. This limitation only applies to occupied positions.

- B. Michael Rura v. Department of Higher Education, State Board of Agriculture, Colorado State University, State Personnel Board case number 2001G117.

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The Board voted to deny Respondent's Motion for Reconsideration of Motion for Stay Pending Appeal.

- C. Petition for Declaratory Order of Stan Margaritas, Gary Martz, Marion Hanson & Colorado Federation of Public Employees, on behalf of all persons similarly situated who are classified employees of Adams State College v. Trustees of the State Colleges in Colorado, Adams State College, State Personnel Board case number 2003D004.

The Board voted to table this matter and to delegate authority to the Director to administratively dismiss it with prejudice.

- D. Elaine Robbins v. Department of Corrections, State Personnel Board case number 2003G001.

The Board voted to adopt the Preliminary Recommendation of the Director and deny petition for hearing.

- E. Renee Granzella v. Department of Corrections, State Personnel Board case number 2003G002.

The Board voted to adopt the Preliminary Recommendation of the Director and deny petition for hearing.

- F. Lura McKinley v. Department of Corrections, State Personnel Board case number 2003G003.

The Board voted to adopt the Preliminary Recommendation of the Director and deny petition for hearing.

- G. Tonie Best v. Department of Corrections, State Personnel Board case number 2003G004.

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The Board voted to adopt the Preliminary Recommendation of the Director and deny petition for hearing.

- H. Ellen Mangione v. Department of Public Health and Environment, Disease Control Division, State Personnel Board case number 2002G124.

The Board voted to adopt the Preliminary Recommendation of the Director and deny petition for hearing.

IX. ADMINISTRATIVE MATTERS & COMMENTS

This portion of the meeting was tabled due to the time consumed for rulemaking.

A. ADMINISTRATIVE MATTERS

- Budget Reports and Revenue and Expense Report
- Cases Scheduled for Preliminary Review
- Cases on Appeal to the Board and to Appellate Courts
- Thank-you note to Board from family of Eric Autobee

B. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. EXECUTIVE SESSION

- A. Case Status Report
- B. Approval of Minutes from November 2002 Executive Session

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Having no more business, the meeting adjourned by consensus.

APPROVED THIS 21st DAY OF JANUARY, 2003.

Joyce Lottner, Chair

John Zakhem, Vice Chair

Linda Siderius, Member

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ATTACHMENT A - RULEMAKING COMMENTS

<u>Date</u>	<u>Type</u>	<u>Author/Group</u>
10/17/02	Notice of Public Hearing to Consider Adoption of Permanent Administrative Procedures	DPA
10/18/02	Notice of Public Hearing to Consider Adoption of Permanent Rules	SPB
11/22/02	Statement of Basis, Specific Statutory Authority, and Purpose for the State Personnel Director's Adoption of Permanent Administrative Procedures	DPA
11/22/02	Proposed Statement of Basis and Purpose (Rules)	SPB
11/22/02	Proposed Personnel Board Rules and Director's Administrative Procedures for SES	SPB/DPA
11/22/02	Proposed Director's Administrative Procedures for SES	DPA
11/22/02	Proposed Personnel Board Rules for SES	SPB
11/22/02	Proposed Rules for the State Personnel Board-Only Rulemaking Hearing December 17, 2002	SPB
11/26/02	Comments on Proposed R-8-45	Don Fowler, DPA/HRS
11/29/02	Request of Unofficial Interpretation	Paul Perales, CU
12/5/02	Comment on SPB Rules	Mark Schwane, CFPE
12/5/02 12/5/02	(1) Written comments regarding proposed Rule 8-30 (2) Proposed Changes to the Board Rules and Director's Administrative	Anna Marie Campbell, DOC Madline SaBell, DOC

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12/5/02	Procedures regarding the Senior Executive Service (3) Written comments regarding proposed changes to the Board Rules	Madline SaBell & Anna Marie Campbell, DOC
12/5/02	SES rules and procedures	Mark Schwane, CFPE
12/6/02	Proposed Board Rules with Staff Comments	SPB
12/12/02	Comments on proposed rules	Cheryl Hutchison, AFSCME Colorado Council 76
12/16/02	Proposed Rules relating to the Senior Executive Service	William D. Buckner
12/16/02	Rulemaking Hearing; R-7-13	Carol Shirey, CSU
12/17/02	Comments on SES rules	Celina Benevidez, DOT
12/17/02	Comments on SES rules	Jennifer Finch, DOT